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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 237

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WILLIAM G. WHEAT, PETITIONER,

VS.

FORD MOTOR COMPANY, A CORPORATION,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE 8th CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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WHITSON ROGERS,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.

INDEX

A. Summary Statement of the Matter Involved 1
The patent 2
The accused structure 6
What the lower courts did 10
Elements of old Model T Ford car 11

B. Reasons Relied On for Allowance of Writ 12

Brief in Support of Petition for Writ of Certiorari 25
I. Opinion of court below 25
II. Jurisdiction 25
III. Statement of the case 25
IV. Specification of errors 26

Argument 26

Conclusion 26

Table of Cases

Adams Grease Gun Corporation vs. Bassick Mfg. Co., 285 U. S. 531 15
Altoona Publix Theaters, Inc., vs. American Tri-Ergon Corp., 279 U. S. 1005 17
Baldwin Case, 99 F. (2d) 1 13
Blanchard vs. Sprague, 3 Sumn. 535 13
Boyden Power Brake Co. vs. Westinghouse, 170 U. S. 537 22
Carbice Corp. of America vs. American Patents Development Corporation, 283 U. S. 27 15
Concrete Appliances Co. vs. Gomery, 269 U. S. 177 17
Continental Paper Bag Co. vs. Eastern Paper Bag Co., 210 U. S. 405 17
Ensher vs. Simon Asher & Co., 282 U. S. 445 14
Forsyth vs. Hammond, 166 U. S. 506 22
Grant vs. Raymond, 6 Pet. 218 13
Hammond Clock Co. vs. Schiff, 293 U. S. 538 14

(32577

Hurn vs. Oursler, 289 U. S. 238 14
In re Abrahamsen, 56 F. 2d 871 22
In re Dowe, 53 F. 2d 543 22
In re Garratt, 63 F. 2d 113 22
Keystone Driller Co. vs. General Excavator Co., 290 U. S. 240 15
Klein vs. Russell, 19 Wall. 433 13
Leman vs. Krentler-Arnold Hinge Sash Co., 284 U. S. 448 15
Magnum vs. Coby, 262 U. S. 159 22
McClain vs. Ortmayer, 141 U. S. 419 13
Monopolies Case, 11 Coke 68 ..... 13, 17, 18
Morimura A. & Co. vs. Taback, 279 U. S. 24 16
Motion Picture Patents Co. vs. Universal Film Mfg. Co., 245 U. S. 503 13
Nye Tool and Machine Works vs. Crown Die and Tool Co., 292 Fed. 851 22
Oates vs. Camp, 83 F. 2d 111 22
Parker Rust Co. vs. Ford Motor Co., 23 F. 2d 502, l. c. 506 18
Reed vs. Edwards, 101 F. 2d 550 20
Rice & Adams Corporation vs. Lathrop, 278 U. S. 509 14
Rubber Co. vs. Goodyear, 9 Wall. 788 13
Sanitary Refrigerator Co. vs. Winters, 280 U. S. 30 16
Singer Mfg. Co. vs. Cramer, 192 U. S. 265 22
Sly vs. Russell & Co., 189 Fed. 61 22
Smith vs. Snow, 294 U. S. 1 ..... 13, 19
Topliff vs. Topliff, 145 U. S. 156 13
Turrill vs. Ry., 1 Wall. 491 ..... 13, 18
United States vs. Dubilier Condenser Corp., 289 U. S. 178 ..... 15, 17
Vulcan Mfg. Co. vs. Maytag Co., 293 U. S. 553 15
Winans vs. Denmead, 15 How. 330 ..... 13, 20, 21
Wine Railway Appliance Co. vs. Enterprise Railway Equipment Co., 297 U. S. 387 14

STATUTES

United States Code Annotated, Section 347, Title 28 25

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES
Your Petitioner Respectfully Says:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The case below was a patent infringement suit. The trial court found the patent noninfringed and valid. Court of appeals affirmed as to noninfringement.

The Patent.

On October 18th, 1921, petitioner was granted a patent for an invention (Tr. 287-295). Between 1932 and 1938 respondent infringed said patent. The purpose of the patent was to construct or reconstruct a light-weight motor car with transverse front and rear springs, so that such car would hold the ground or surface when traveling at high speed (Tr. 293).

The patent was a combination of elements. The combination in each claim was prefaced by an introductory phrase (Tr. 295). That phrase was the patent title. It was no part of the combination. Nor did the title accurately describe the combination.

The elements co-operated together to enable such automobile to safely travel at high speed. Those elements so co-operating lowered the center of gravity of the structure and in addition thereto dampened the vibration of the rear axle (Tr. 156) by producing a "phenomenon" which had the same effect as if the moment of inertia of the rear axle were increased (Tr. 148, 149, 150, 151) and also by reducing the oscillation of the front axle at high speed (Tr. 23). This combination enabled such car to hold the ground or surface (Tr. 293) and to give it a greater degree of stability at high speed in any case (Tr. 156).

The "phenomenon" enabled the rear wheels and tires to lessen skidding tendencies by remaining in contact with the road for a greater length of time for the distance travelled. The element of the combination known as the rear spring placed to the rear of the rear axle not only contributed to the lowering of the center of gravity (Tr. 293) by bringing the body of the car closer to the road (Tr. 293) but also produced the "phenomenon" described by the expert scientist, without contradiction, as producing the same effect as if the moment of inertia were made larger (Tr. 151).

The element known as the forked end radius rod gripping the front axle above and below at the spring perch location (Tr. 160-293, Fig. 4, and Fig. 8, Tr. 289) preserved the tilt of the axle (Tr. 23) and lessened the weave thereof at high speed thereby co-operating with the lowered center of gravity and the above-mentioned phenomenon of the rear axle to stabilize the car at high speed.

The element described in the specifications as a substantially U-shaped rear bracket (Tr. 293) illustrated by right photo (Tr. 269) and Figure 6 (Tr. 289) of the patent drawings lowered the main or body portion of the frame.

The element described as a Z-shaped bracket in front contributed to the lowering of the main portion of the frame and the power plant by suspending the power plant behind the front spring on the lower rear flange of the Z bracket and suspending the upper or forward flange of the bracket on the front spring as illustrated in right photo (Tr. 269) and Figure 4 (Tr. 289) and Figure 1 (Tr. 291) and by defendant's exhibits at (Tr. 377 and 379). The Z bracket in combination with the U-shaped or "goose neck brackets" described by court of appeals (Tr. 486) created a *drop side sill frame* which was one of the factors in lowering *the center of gravity of the body of the car* (Tr. 250) as admitted by respondent's expert. The court of appeals (Tr. 486) in describing the elements of the patented combination wholly overlooked the element consisting of the forked end radius rod described in the claims (Tr. 295), the specification (Tr. 293) and illustrated by Figure 8 of the drawings of the patent (Tr. 289) and shown in the accused structure (Tr. 271) (Tr. 365) (right upper photo from bottom of record right lower from bottom of Defendant's Exhibit "6"). This grave omission was due doubtless to like carelessness on the part of the trial court which substituted an "etc." for said radius rod in its opinion (Tr. 455) and wholly ignored it in its findings of fact (13-14-15) and

conclusions of law (Tr. 15-16). Manifestly neither court ever read the patent.

The patent was used by others before respondent infringed. Chevrolet Brothers Manufacturing Company of Indianapolis, Indiana, originators of the popular Chevrolet automobile, used said patent in their "Fronty Ford race cars" and paid petitioner for such use (Tr. 297) (Tr. 107-108-109).

The officers of respondent were familiar with petitioner's patent many years before respondent infringed it. The letterhead of Chevrolet Brothers advertises the racing car. The letterhead contains a reproduction of a photograph taken at the Indianapolis speedway with the statement thereon (Tr. 297):

"Indianapolis Speedway—500 mile race." Beneath the photograph is the legend "Henry Ford seated in car."

The well-known form and face of the automobile magnate is reproduced. The photograph reproduces the faces and forms of a number of others standing around the car including the famous son of the automobile magnate, Edsel Ford, also the brothers, Louis and Arthur Chevrolet, and H. C. Stutz of Stutz motor car fame (Tr. 297).

A Mr. Wilbert Hunt was works plant manager for Chevrolet Brothers Manufacturing Company for a period between the date of the issuance of petitioner's patent and respondent's infringement (Tr. 188). He was also a professional automobile race driver on the Indianapolis speedway in Ford race cars (Tr. 172, 173, 179). In the year 1926 respondent sent an attorney to interview Mr. Hunt at Indianapolis who gave such information concerning the structure as he had (Tr. 116, 211, 212). The above evidence was given by Mr. Hunt who was called by respondent as its chief witness in support of its unfounded claim of anticipation (Tr. 172). However, respondent did not infringe the patent until the year 1932 in its V-8 Ford cars.

Respondent established by its said witness Hunt and by its copyrighted magazine articles in the "Ford Owner," Exhibits 17 (Tr. 405 *et seq.*) and 18 (Tr. 435 *et seq.*), that the discovery made by petitioner and so used on the Indianapolis speedway supplied a long-felt want. As late as September, 1932, about the time respondent first infringed the patent the eminent aeronautical engineer and designer, William B. Stout, in his article entitled "The Motor Car of the Future," in the copyrighted magazine, "Popular Mechanics," wrote (p. 443):

> "Low center of gravity is not necessarily an indication of roadability. Indeed, some of the present cars actually are swung so close to the road that skidding tendencies are vastly increased. The center of mass must be so disposed that the side thrust created in turning corners presses downward on the outside wheels thus increasing traction and preventing skidding" (Tr. 18).

However the above is true only as long as the rear tires actually remain in contact with the road. If the rear axles and wheels start vibrating due to bumps in the road traction is lost and skidding begins. Petitioner's patent tends to dampen undue vibration of the rear axle and wheels by producing the same effect as if the moment of inertia of said axle were made larger (Tr. 151) which inertia effects cannot be produced merely by lowering the center of gravity but depends on the contribution thereto made by all the elements and especially on the element of the combination, placing rear spring to rear of rear axle. Respondent's expert concurred (Tr. 252) and thus conclusively established that merely lowering the center of gravity as had been done by those who were experimenting and seeking for the discovery made by petitioner accomplished nothing except lowering the center of gravity and that their efforts merely amounted to abandoned experiments of the type both lower courts evidently had in mind when they wrote their erroneous opinions.

The Accused Structure.

The accused infringing combination consists of elements duplicating those of petitioner's patent. Those elements co-operate in combination to lower the center of gravity of the accused structure and in addition thereto to dampen the vibration of the rear axle by producing the same phenomenon as the patent, to-wit: causes the same effect as if the moment of inertia of the rear axle were increased (Tr. 148, 149, 150, 151) and also by reducing the oscillation of the front axle when traveling at high speed. This combination enables the accused structure to hold the ground or surface when traveling at high speed as though the accused structure were literally glued to the road (Tr. 43) and to give it a greater degree of stability at high speed in any case (Tr. 156).

The "phenomenon" enables the rear wheels and tires of the accused structure to remain in contact with the road for a greater length of time for the distance travelled and thus lessens skidding tendencies (Tr. 148, 149, 150, 151).

The element of the combination in the accused structure known as "the rear spring placed to the rear of the axle" not only contributed to the lowering of the center of gravity (Tr. 281) by bringing the body of the accused structure closer to the road (Tr. 285) as conclusively established by respondent's admitted copyrighted catalogues received in evidence (though denied by its counsel (Tr. 66) and expert witness Brush) (Tr. 242) but also produced the "phenomenon" described by Professor Hoecker without contradiction as "causing the same effect as if the moment of inertia were made larger" (Tr. 151).

The forked end radius rod element duplicated that of the patent and is illustrated by that element in "Plaintiff's Exhibit 3" (Tr. 271) and "Defendant's Exhibit 6" (Tr. 365) right upper photo (from bottom of record) and right lower photo (from bottom of the picture). It grips the front axle above and below at the spring perch (Tr.

365) location and preserves the tilt of the axle (Tr. 23) thereby lessening the oscillation thereof at high speed and thereby co-operating with the lowered center of gravity and the above-mentioned "phenomenon" of the rear axle to stabilize the car at high speed.

The element in the accused structure referred to in the evidence and court opinions as "drop side sills" are illustrated by Exhibits 3 (Tr. 271), 4 (Tr. 273), 15 (Tr. 299), 6 (Tr. 277) (Tr. 35) (Tr. 31).

The drops or "kicks" in the portion of the frame over the rear axle are integral duplications of the "U" channel (Tr. 293) or "goose neck" rear brackets referred to in the opinion of the court of appeals (Tr. 486) and likewise operated in the same way to lower the center of gravity of the main portion of the frame of the accused structure.

The element described by respondent's counsel as a "Z form" (Tr. 64) "less deeper arched cross member" (so described by respondent's expert Brush) contributed to the lowering of the center of the main portion of the frame and the power plant by (Tr. 242) suspending the engine behind the front spring in the accused structure on the rearwardly extending lower flange of said "Z form" cross member (Tr. 68) in the same way that the engine and chassis is suspended behind the front spring in the patented structure on the rearwardly extending lower flange of the Z bracket of the patent (Tr. 66). The upper horizontal portion of the "Z form" front cross member is supported on the front spring and corresponds to the upper flange of the Z bracket of the patent and is secured to the spring in the same way in front of the engine mounting. This is illustrated by Defendant's Exhibit 1 (Tr. 313). This Z form less arched cross member in combination with the integral "goose neck" brackets of the frame over the rear axle is the "drop side sill" frame which is one of the factors in lowering the center of gravity of the body of the accused structure.

The court of appeals in describing the element of the accused combination wholly overlooked the element consisting of the forked end radius rod of the accused structure illustrated by Defendant's Exhibit 6 (Tr. 365) right upper photo and described in the evidence (Tr. 160) (see also Tr. 271). This grave omission was doubtless due to like carelessness on the part of the trial court which did not even substitute an "etc." therefor and which seemed to think that the *only* elements in the accused structure was "a drop front axle" and "drop center side sills" according to its opinion (Tr. 455) (Tr. 457) (Tr. 458), a statement contradicted by its own Finding of Fact 3 (Tr. 14) which adds "a flattened spring" and also contradicted by the court of appeals which found in addition that "the rear spring to rear of rear axle" (Tr. 486) was a part of the lowering combination. Indeed the findings of the trial court demonstrate that it had no conception of the facts in the record and that it in effect permitted the respondent to decide the case, for that court made Finding of Fact 7 at respondent's suggestion notwithstanding respondent's own admitted copyrighted catalogues (Tr. 281, 285) contradicted said suggested and given finding of fact. That finding recites:

> "The rear spring suspension in the accused construction is not a factor in the lowering of the main portion of the chassis—etc." (Tr. 14).

Whereas the catalogue says (Tr. 281) of the rear spring back of the rear axle,

> "*This contributes* to the lowness which is a feature of the new Fords."

And on the same subject its catalogue says,

> "By this method (rear spring back of rear axle) the body may be mounted close to the road and a low center of gravity obtained (Tr. 285) spring hangers are mounted behind the axle which considerably lowers the body" (Tr. 285).

And the court of appeals in its opinion held that as to the accused structure:

> "The lowering of the body was accomplished through the use of a drop center front axle, a flatter front spring, double drop chassis side rails and a rear spring suspended behind the rear axle" (Tr. 459).

~~Manifestly~~ It is manifest the trial court neither read nor heard the exhibits read and that the court of appeals did read Exhibits 8 (Tr. 281) and 10 (Tr. 285).

However, both courts overlooked the undisputed fact that the Z form less arched front cross member and raised frame (Tr. 64) (Tr. 242) constituted a contributing factor in the lowering of the accused structure and power plant and operated in the same way to contribute to said lowering as did the Z bracket of the patent.

The raised frame and Z formed cross member of the accused structure (Tr. 231, 365) together equal the overall height of the body portion of the Z bracket of the patent and it was conclusively established by respondent's witness Hunt (Tr. 180) with the concurrence of petitioner (Tr. 82) that said raised frame and cross member together accomplished the same distance lowering as the Z bracket of the patent, and ~~constructed~~ construed an equivalent thereof.

From this it follows that it is manifest that neither court ever fully read the record. Said courts never found anything in respondent's catalogues or advertising matter to justify the finding that a "drop center front axle" and "flattened spring" contributed to the lowering of the body of the accused structure. The only catalogue reference to a front axle is at (Tr. 23) which does not even use the adjective "drop" or the phrase "drop center" in describing the axle and no mention whatsoever is made in said catalogues or

advertising matter of a "flattened front spring" and respondents never offered any catalogues or literature in evidence to sustain its own findings (Tr. 14) so adopted by the trial court and likewise so adopted by the court of appeals. The substitution of these findings for the real facts by courts of conscience challenges the attention of this court in this proceeding.

What the Lower Courts Did.

The trial court construed the patent as though it were an odious monopoly that is—narrowly—and though there was nothing in the language of the patent to justify it held that petitioner did not have a patent such as would prevent the embodiment of his patent in a new or originally constructed automobile and that such embodiment of his patent in the accused structure did not infringe on the untenable ground that the patent is limited to old cars. The court of appeals affirmed on this ground (Tr. 488). It is evident that both courts having decided against petitioner on the foregoing untenable theory were careless in their *obiter* examination of the facts.

The opinion of the Court of Appeals giving its *obiter* conclusion that each of the means employed by respondent in its accused structure made its separate contribution toward securing the desired result, has no merit since the court's opinion shows that it did not know what the elements of the accused structure were and in any event exhibits 3 (Tr. 271) and 15 (Tr. 299) show that the accused structure is a physical entity and, as a physical fact, that each part of the accused structure in operation is dependent on every other part and all must jointly operate to produce the desired result.

Elements of Old Model T Ford Car

(are set out across the page).

Elements of Patented Combination	Elements of Accused Combination
1. Rear transverse spring secured at points rearwardly of the adjacent rear axle (Tr. 293-295-291-289).	1. Rear transverse spring secured at points rearwardly of the adjacent rear axle (Tr. 488-267-271-273).
1. Rear transverse spring secured directly on top of rear axle (Tr. 269-351, Fig. 2).	
2. Substantially Z-shaped front bracket the upper projecting flange of which supports the structure on top of the front spring. Rearwardly projecting flange of bracket supporting power plant behind front spring and forward portion of frame side sills secured to extremities of front cross member (Tr. 295).	2. Substantially Z-formed U-shaped inverted less arched channel front cross member with rearwardly horizontal projecting flange, the top lower surface of which supports the structure on top the front spring. The rearwardly horizontal projecting flange supporting the power plant behind the front spring and raised forward portions of frame side sills secured to extremities of front cross member (Tr. 64-313).
2. U-shaped inverted channel front cross member without horizontal flanges extending to either front or rear. Power plant or motor secured to cross member directly above front spring, and forward portion frame side sills secured to extremities of front cross member (Tr. 269).	
3. Forked end radius rod gripping the front axle above and below at the	3. Forked end radius rod gripping the front axle above and below at the

spring perch locations and preserving the tilt of the front axle (Tr. 295-160).	spring perch locations and preserving the tilt of the front axle (Tr. 289-365-23-160).

3. Front radius rod of substantially V shape secured to extremities of front spring to spring perches at points either above or below the axle but not at points both above *and* below axle as in the patented and accused structures. The old radius rod had either a bolt end or an eye and depending on the age of the car (Tr. 365) upper photos.

4. Goose neck U channel form rear brackets set forth in specifications but not in claims which produced a *drop side sill frame* (Tr. 289-269).	4. Goose neck U channel rear bracket made integral with and producing a *drop side sill frame* (Tr. 271-273).

4. Model T Ford used a straight side sill frame *without drop center side sills or kicks.*

B.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

I.

The trial court decided and the court of appeals affirmed the judgment of the lower court holding that the patent was an odious monopoly and that the mental concept embodied by petitioner was limited to an old structure and that its embodiment in a new structure could not infringe, which rule of narrow construction is in direct conflict with the liberal rule of construction applied to patents for inventions by this and all other courts since the beginning of the government and consequently this consideration alone makes this case more than an ordinary

patent case wherein fact questions as to validity and infringement may be involved and is a case where a question of pure law, to-wit: (In the *Baldwin Case*, 99 F. (2d) 1,) the construction of a patent has been decided by both lower courts applying a narrow rule of construction to this patent—a rule in conflict with the decisions of this and all the other circuit courts of appeals and hence certiorari should issue.

The rule applied to patents in the *Monopolies Case*, 11 Coke 88, was never applied in this country until it was applied herein by both lower courts. *Blanchard* v. *Sprague*, 3 Sumn. 535, by Story, J.; *Grant* v. *Raymond*, 6 Pet. 218, per Marshall, C. J. The rule is that patents for inventions must be liberally construed.

Winans v. *Denmead*, 15 How. 330, a leading case involving a lower center of gravity of a structure.

Turrill v. *Ry.*, 1 Wall. 491.

Smith v. *Snow*, 294 U. S. 1.

Rubber Co. v. *Goodyear*, 9 Wall. 788.

Motion Picture Patents Co. v. *Universal Film Mfg. Co.*, 245 U. S. 503.

Klein v. *Russell*, 19 Wall. 433.

McClain v. *Ortmayer*, 141 U. S. 419.

Topliff v. *Topliff*, 145 U. S. 156.

Said rule was ignored by both lower courts and hence certiorari should issue.

II.

Since both lower courts contradicted each other as to the facts found by them and the findings by both were clearly wrong and since both lower courts as to the facts they omitted to find were clearly wrong and since both lower courts applied a narrow rule of construction to the patent itself and limited its application to old or already constructed automobiles without any justification in the language of the patent for such construction and thus and

thereby in this litigation destroyed petitioner's property right in his patent contrary to all the decisions of this court and of all the other circuit courts of appeals it follows that this is a case involving questions other than ordinary issues of validity and infringement of particular patents and consequently the writ should issue.

Jurisdiction of the Supreme Court, pp. 670, 671, in Robertson and Kirkham and cases cited.

III.

The patent case involved herein is of a character to which the rule concerning certiorari involved in all other cases applies, to-wit: a conflict of decisions between circuit courts of appeals is a ground in itself for a writ of certiorari in patent cases of this character as in all other cases where such rule applies.

Ensher v. *Simon Asher & Co.*, 282 U. S. 445.

Rice & Adams Corporation v. *Lathrop*, 278 U. S. 509.

Hurn v. *Oursler*, 289 U. S. 238.

Hammond Clock Co. v. *Schiff*, 293 U. S. 538.

Wine Railway Appliance Co. v. *Enterprise Railway Equipment Co.*, 297 U. S. 387.

The question here involved is a question of pure law, to-wit:

Whether the mental concept embodied in the patented combination could be used by respondent in its accused structure without infringement and whether it applied to originally constructed or old cars.

This question is presented by the opinion of the court of appeals when in discussing the claims it said:

> "that each is for a combination of elements arranged in a specific way for the purpose of lowering the body of an *already constructed automobile*" (Tr. 488).

IV.

Even if there were no conflict between the decision of the court of appeals and those of other circuit courts of appeals yet the narrow rule of construction applied is contrary to the liberal rule of construction of patents for inventions observed by this court from the beginning of this government and since the decision of the courts of appeals has failed to give effect to the scope of the patent required by the Constitution and laws by approving respondent's conduct in intentionally embodying the patented structure in its accused structure and has thereby failed to give effect to the rulings of this court requiring liberal construction of patents and hence, the writ should issue.

Carbice Corp. of America v. *American Patents Development Corporation*, 283 U. S. 27.

Adams Grease Gun Corporation v. *Bassick Mfg. Co.*, 285 U. S. 531.

This court has always held that patents must be liberally construed.

V.

This patent case is one involving novel and important questions concerning the application of a general rule of law as to the rights of persons to protection by the federal courts against persons who intentionally destroy such rights for their own gain by flouting the Constitution and laws of the country adopted and enacted for the protection of such rights and the writ should therefore issue.

Keystone Driller Co. v. *General Excavator Co.*, 290 U. S. 240.

United States v. *Dubilier Condenser Corp.*, 289 U. S. 178.

Leman v. *Krentler-Arnold Hinge Sash Co.*, 284 U. S. 448.

Vulcan Mfg. Co. v. *Maytag Co.*, 293 U. S. 553.

VI.

The opinion of the district court after limiting the patent to old automobiles and authorizing its embodiment in new stated that the lowering of the accused structure was accomplished by a "drop axle" and "drop side sills"; the opinion of the court of appeals after likewise limiting the patent to old automobiles and holding that respondent's new structure by embodiment of the patent could not infringe yet proceeded to find facts endeavoring to show the patent was not so embodied and found that in addition to the "drop axle" and "drop side sills" mentioned in the lower court's opinion the accused structure accomplished its lowering by also using "a flatter spring" and "the rear spring to the rear of the rear axle"; in other words the findings in their opinions by both lower courts as to the elements of the combination in the accused structure are in conflict and hence the principle that findings of fact concurred in both lower courts will be accepted by the Supreme Court does not apply.

Morimura A. & Co. v. *Taback*, 279 U. S. 24.

Herein there is a conflict of decisions between the lower courts in respect of an issue turning upon the facts, to-wit: the elements of the combination in the accused structure and in the patented structure and consequently the concurrence of the two courts in the decision against petitioner will not control and this court will itself ascertain wherein the truth lies.

Sanitary Refrigerator Co. v. *Winters*, 280 U. S. 30.

VII.

Not only is there a conflict between both lower courts as to the elements of the combination of the accused structure but both said lower courts ignored the conceded fact established by the evidence of the respondent and concurred in by petitioner to the effect that the lowering of the accused structure was accomplished in front by a "Z-

formed" (Tr. 64) "less deeply arched cross member" (Tr. 242) which statement was concurred in by the petitioner and consequently the concurrence of both courts in omitting this element so conceded to be a factor in the lowering of said accused structure is clearly wrong and the concurrence of both courts in this plain error cannot be accepted by this court.

Continental Paper Bag Co. v. *Eastern Paper Bag Co.*, 210 U. S. 405.

Altoona Publix Theaters, Inc., v. *American Tri-Ergon Corp.*, 279 U. S. 1005.

Concrete Appliances Co. v. *Gomery*, 269 U. S. 177.

VIII.

Since the undisputed facts established by the evidence of the respondent show that the patented and accused structures each have a combination of lowering elements which have the same form, method of operation, result and function, it follows that the accused structure has infringed petitioner's patent and the holdings by both courts that the patent applied only to old automobiles and not to new is an express decision holding that the embodiment (in an old car) of the mental concept (which mental concept is the basis of the invention) is the invention and that such embodiment (in an old car only) was the subject of the patent and that the mental concept which is the basis of invention is not the subject of the patent—a decision which directly conflicts with the decision of this court in *U. S.* v. *Dubilier Condenser Corp.*, 289 U. S. 178, l. c. 192, and necessitates the issuance of the writ.

IX.

The opinion of the district court indicates that it decided the case upon the theory that the patent was an odious monopoly of the kind referred to in *The Monopolies Case*, 11 Coke 88, and hence to be narrowly construed after the fashion pointed by Justice Story in 3 Sum. 502,

pursued by the English courts in construing patents for inventions and by the application of which it applied the patent to old cars only—a rule directly contrary to that observed by this court and well illustrated in its decision in *Turrill* v. *Ry.*, 1 Wall. 491, when it approved Justice Story's condemnation thereof in the above case as follows:

> "Patents for inventions are not to be treated as mere monopolies and, therefore, odious in the eyes of the law; but they are to receive a liberal construction, and under the fair application of the rule, *ut res magis valeat quam pereat*, are, if practicable, to be so interpreted as to uphold and not to destroy the right of the inventor. *Ryan* v. *Goodwin*, 3 Sumn. 520."

The opinion of the court of appeals affirmed this untenable doctrine and because of the conflict the writ should issue.

X.

Respondent intentionally appropriated petitioner's patent on the theory that all patents are odious monopolies of the kind referred to in the *Monopolies Case* (11 Coke 84a-86a), as judicially determined in *Parker Rust Co.* v. *Ford Motor Co.*, 23 F. 2d 502, l. c. 506, where it is said:

> "The record shows, too, that Mr. Henry Ford, who dominates the defendant corporation, is absolutely opposed to the operation of the present patent system and to the payment of royalties to anyone. This is clearly expressed by a statement made by Mr. Davis, defendant's patent attorney stationed at the plant: 'There is no power on earth, this side of the Supreme Court of the United States, which would make Henry Ford sign a license agreement or pay a royalty."

The lower courts approved this opposition of respondent to the Constitution and laws of the United States and denied to petitioner the protection and security guaranteed to him by Article I, Section 8, Clause 8, of the

Constitution requiring the Congress "to promote the progress of science and the useful arts" by securing to inventors for limited times the right to their discoveries and therefore decided the case against petitioner and in direct conflict with the command of the applicable provisions of the Constitution and laws of the United States and by so doing acting in excess of the power and jurisdiction vested in said courts by the Constitution and laws and for said reason the writ should issue.

XI.

The court of appeals incorrectly stated the file wrapper history. Its opinion reproduces the patent examiner's first letter of rejection (Tr. 486-331) and reproduces a letter of petitioner's attorney submitting five substituted claims (Tr. 487) but does not point out that the claims then substituted were not (Tr. 343) allowed and said letter so quoted in the opinion did not accompany the claims which were finally allowed but ~~what~~ that another letter of petitioner's attorney omitting the matter in the letter set out in the opinion accompanied the claims finally allowed (Tr. 345) (Tr. 347). The opinion omitted to point out that the only element of the claimed combination rejected on references was "the rear spring to the rear of the rear axle" and that this element was allowed as originally written. No other element was rejected on references. The opinion omits to point out that the combination was never rejected and omits that the rejection of an element of a combination later included in the claims of the combination does not narrow the scope of the claims of the combination. Hence certiorari should issue because the opinion conflicts with *Smith* v. *Snow*, 294 U. S. 1, and cases cited.

XII.

The opinion of the court of appeals incorrectly stated that the prior art necessitated a narrow construction of

the patent. The evidence of respondent's expert (Tr. 251) demonstrated that the combination of the patent was never known to the automobile industry or the public either in publication or structure and that the patent was the first in the art and because no other patent of that genera or species was ever issued since but the opinion of the court of appeals fails to mention these facts and that its assertion that the claims were limited by the prior art had no foundation in the evidence.

XIII.

The opinion of the court of appeals mentions the specifications as justifying a narrowing of the scope of the patent. But the specification notwithstanding it was not necessary so to do under the ruling in *Winans* v. *Denmead,* 15 How. 330, specifically points out that only the preferred method or form was specified and did not limit or narrow the patent. The opinion omits to point out that the specifications instead of limiting the paten to reconstructed cars also specifically included the embodiment in the "construction" of cars.

XIV.

The opinion of the court of appeals assumes that the accused device did not include elements essential to plaintiff's patented combination (Tr. 490).

However said opinion points out (Tr. 486) all the elements of petitioner's patent save and excepting the front radius rod and thereby found that the Z bracket of the patent and all its parts mentioned in the claims were one element in accordance with the rule stated by the court in *Reed* v. *Edwards*, 101 F. 2d 550, thus:

> "For patent purposes a given structure may in one sense be considered a single element and in another sense it may be so formed as to consist of several elements depending upon the functions to be performed by such elements."

The record and copyrighted catalogues show that they contain no basis for said assumption.

XV.

The Z-shaped bracket of the patent and the Z-formed less arched cross member and raised forward frame of the accused structure were identical means which operated in the same way to perform the same function and produce the same result and are therefore the equivalents of each other. That is to say:

Both elements are of Z shape or form. Both elements support the power plant on a rear extending flange back of the front spring. Both elements rest on the front spring on the lower surface of the upper flange of the Z bracket and Z-formed cross members in what respondent's counsel referred to as its single Z form rather than its double Z form. Both elements thus supporting the respective structures and power plants. Both elements contributed to the lowering of the body portion of the structures and power plants.

It follows that these elements of both structures were either duplicates or equivalents of each other and that the decision of the court of appeals is in conflict with the decision of this court in *Winans* v. *Denmead,* 15 How. 330 (a lowered center of gravity patent case), and all the authorities since following that leading decision and hence certiorari should issue.

XVI.

The court of appeals erred in holding that the introductory phrase constituting the title of the patent and not accurately describing the combination was a part of the combination set forth in each claim and said ruling conflicts with the fundamental verities and with the follow-

ing decisions of other circuit courts of appeal on this identical point and hence certiorari should issue.

In re Garratt, 63 F. 2d 113.
In re Abrahamsen, 56 F. 2d 871.
In re Dowe, 53 F. 2d 543.
Nye Tool and Machine Works v. *Crown Die and Tool Co.*, 292 Fed. 851.
Sly v. *Russell & Co.*, 189 Fed. 61.

XVII.

Petitioner's patent solved a problem for the solution of which others had sought in vain and made a substantial contribution to the safety of highway travelers and hence the patent was entitled to a liberal construction of its claims and a liberal application of the doctrine of equivalents and the decision of the court of appeals on this point is in direct conflict with the decision of the Court of Appeals for the Fourth Circuit in *Oates* v. *Camp*, 83 F. 2d 111.

XVIII.

Petitioner's patent is for a combination covering a function never before performed and since no such patent has ever issued before or since in its art it is a pioneer patent entitled to the broadest range of equivalents and the decision of the court of appeals is therefore in conflict with all the decisions of this and the other courts of appeals on the subject.

Boyden Power Brake Co. v. *Westinghouse*, 170 U. S. 537.
Singer Mfg. Co. v. *Cramer*, 192 U. S. 265.

XIX.

This is a case peculiarly calling for the exercise of the discretion rested in this court by the statute to issue the writ prayed for as pointed out in *Forsyth* v. *Hammond*, 166 U. S. 506; *Magnum* v. *Coby*, 262 U. S. 159, and Rule 38 of this court.

Wherefore, your petitioner prays that a writ of certiorari under the seal of this court directed to the United States Circuit Court of Appeals for the Eighth Judicial Circuit commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said United States Circuit Court of Appeals for the Eighth Circuit and of case numbered and entitled in its docket No. 11720, civil, William G. Wheat, appellant, vs. Ford Motor Company, a corporation, appellee, to the end that cause may be reviewed and determined by this court as provided for by the statutes of the United States and that the judgment of the United States Circuit Court of Appeals for the Eighth Circuit be reversed by this court, and for such further relief as to this court may seem proper.

Kansas City, Missouri, July 1st, 1941.

William G. Wheat,
Petitioner,
By EVERETT MEYER,
WHITSON ROGERS,
MARTIN J. O'DONNELL,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of Court Below.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is reported in 112 F. 2d 612, and at pages 485-490 of the transcript of the record. The opinion of the trial court is reported in 26 Fed. Supp. 587 and at pages 455 to 459 of the record.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is April 9th, 1941.

2. The statutory provision which is believed to sustain the jurisdiction of this court is the following: Section 347, 28 United States Code Annotated, providing:

> "* * * in any case, civil or criminal, in a circuit court of appeals * * * it shall be competent for the Supreme Court of the United States upon the petition of any party thereto, whether government or other litigant, to require by certiorari, either before or after a judgment or decree of such lower court that the cause be certified to the Supreme Court for determination by it with the same power and authority and with like effect as if the cause had been brought there by unrestricted writ of error or appeal."

(Which said statute in its present form was adopted February 13, 1925, 43 Statutes 938.)

III.

Statement of the Case.

This has already been stated in the preceding petition. It is hereby adopted and made a part of the brief.

IV.

Specification of Errors.

1. The court erred in holding that the judge of the trial court committed no error in holding that plaintiff's patent was an odious monopoly and that its use in the accused construction because it was a new car and not an old did not infringe.

2. The court erred in affirming the ~~fundamental~~ finding of the trial court after it had found that Findings of Fact 3 and 7 were erroneous by finding contrary to said findings by the trial court that one of the elements of the accused structure which was a factor in the lowering was a rear ~~of the~~ spring behind the rear axle and in failing to find ~~what~~ that the Z bracket was a duplicate in form, operation and result of the Z ~~bracket~~ or at least a mechanical equivalent thereof.

3. The court erred in holding that petitioner had no right to recover.

Argument.

The reasons given in the petition for the writ together with the facts stated in the petition so plainly state the position of the petitioner and ~~so~~ his right to have the writ prayed for ~~ensued~~ issued that he waives argument.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, in order that justice be done herein and that the conflicts on the important questions herein involved be corrected and that to such end a writ of certiorari should be granted and this court should review the decision of the United States Circuit Court of Appeals for the Eighth Judicial Circuit and finally reverse it.

Respectfully submitted,

EVERETT MEYER,
WHITSON ROGERS,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.

(2)

FILED
AUG 18 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

No. 237.

WILLIAM G. WHEAT, Petitioner,

vs.

FORD MOTOR COMPANY, A CORPORATION, Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

FRANK PARKER DAVIS,
I. JOSEPH FARLEY,
Counsel for Respondent.

Eastman Bros., Law Printers, 542 S. Dearborn St., Chicago

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FORD MOTOR COMPANY, A CORPORATION, Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition appears to us to be so obviously groundless that we can see no occasion for any detailed reply to it. No basis is shown to exist for granting certiorari, such as any one of those bases exampled in the rules of this Court, nor is there any other reason for the issuance of the writ. A simple private controversy has been waged in nowise of public interest, and no unsettled

question of law is involved. Indeed the case did not turn upon any question of law but upon a plain issue of fact, to-wit, that of infringement of a patent. The patent in suit has not been litigated elsewhere so no conflict of judicial opinions exists concerning it. Both the District Court and the Court of Appeals based their decisions on non-infringement. The only opinions that are in conflict are the opinion of petitioner's counsel and the concurring opinions of those courts.

The claims of this patent are very limited, and their limitations are emphasized by the proceedings had in the Patent Office during prosecution of the application for the patent (Defendant's Exhibit 2, Tr. p. 315). These claims clearly fail of application to the accused construction,—either literally, in substance, or under doctrine of mechanical equivalents. It is of no consequence what standing the purported invention may have had in the art which might have warranted the granting of broader claims. Every element of each claim is made material by its inclusion therein, so that the total absence from the accused construction of certain specified elements necessarily excludes that construction from the scope of the claims.

In point of fact the prior art of record, which includes illuminating patents and publications unnoticed by the Patent Office, left little or nothing of novelty in the subject matter of the patent in suit (see *e. g.*, Defendant's Exhibit 8, p. 369; Exhibit 16, p. 401; Exhibit 17, p. 425; Exhibit 18, p. 441; Exhibit 19, p. 443; and Exhibit 20, p. 445). The claims, limited as they are to trifling details of construction, nevertheless well measure what little the patentee contributed to the art,—not enough indeed to suggest anything whatever of a patentable nature.

If any such practice was countenanced as that upon which the petition proceeds, in complete disregard of the statutory requirement that the applicant for a patent "shall particularly point out and distinctly claim the part, improvement, or construction which he claims as his invention or discovery", chaos would result in the administration of the patent laws.

A further example of petitioner's misdirected effort is to be found in a shifting of ground for his infringement contention. At trial he went upon the proposition that an equivalent of his Z-shaped bracket was to be found in the up-turned front end portions of the *side rails or sills* of respondent's chassis. Now he shifts from that position to an attempt at finding an equivalent in the *front cross member* of respondent's chassis.

Thus petitioner would have this Court issue a writ of certiorari for review on a different theory of infringement from that which will be found upon the record to have been advanced below,—a singularity in conception of Supreme Court practice in patent jurisprudence, to say the least. "He is not permitted thus to mend his hold." *Railway Co.* v. *McCarthy*, 96 U. S. 258, 267.

We submit that the petition is wholly without merit and should be denied.

Respectfully submitted,
FRANK PARKER DAVIS,
I. JOSEPH FARLEY,
Counsel for Respondent.

(3)

SEP 10 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 237.

WILLIAM G. WHEAT, PETITIONER,

VS.

FORD MOTOR COMPANY, A CORPORATION,
RESPONDENT.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

EVERETT MEYERS,
WHITSON ROGERS,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.

Table of Cases

Bogni vs. Perrotti, 224 Mass. 152 4
Bronson vs. Kenzie, 1 How. 317 4
Diamond Rubber Co. vs. Consolidated Rubber Tire Co., 220 U. S. 428 10
Green vs. Biddle, 8 Wheat. 75 4
Imahaeuser vs. Burk, 101 U. S. 607 10
In re Janell, 120 F. 2d 1012, Syl. 1 5
Jabers Manville Co. vs. National Tank Seat Co., 49 F. 2d 142 3
Keller vs. Adams et al., 264 U. S. 314 ..... 3, 4
Leeds & Coblin Co. vs. Victor Talking Machine Co., 213 U. S. 301 10
Morley Construction Co. vs. Maryland Casualty Co., 300 U. S. 185 6
Nye Tool and Machine Works vs. Crown Die and Tool Co., 292 Fed. 851 (C. C. A. 7) 5
Parker Rust Co. vs. Ford Motor Co., 23 F. 2d l. c. 506 14
Parks vs. Booth, 102 U. S. 96 10
Railway Co. vs. McCarthy, 96 U. S. 258, 267 12
Reed vs. Edwards, 101 U. S. 550 11
Rubber Co. vs. Goodyear, 9 Wall. 788 3
Schriber-Schroth Co. vs. Cleveland Trust Co., 305 U. S. 47, 83 L. Ed. 34 3
Sly vs. Russell & Co., 292 Fed. 851 (C. C. A. 6) 5
Smith vs. Snow, 294 U. S. 1 3
Sun Ray Gas Corp. vs. Bellows-Claude Neon Co., 49 F. 2d 886 3
Turrill vs. Ry., 1 Wall. 491 3
U. S. vs. Société Anonyme et al., 224 U. S. l. c. 328 5

TEXTBOOKS

48 C. J. 31 10
United States Code, Section 347, Title 28 4
United States Code, Section 377, Title 28 4
Walker on Patents, Sixth Edition, Section 238 9
Walker on Patents, Sixth Edition, Section 230, page 316 9

CONSTITUTION

Constitution, Article I, Section 8, Clause 8 2

Supreme Court of the United States

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FORD MOTOR COMPANY, A CORPORATION, RESPONDENT.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

I.

The construction by the court of appeals of the patent herein, contrary to the law on the subject, is a matter of public interest—especially since the courts below have unsettled the law.

Respondent says:

> "A simple private controversy has been waged in nowise of public interest, *and no unsettled question of law involved.*"

Since this is an inventive nation devoted by its Constitution "To the progress of science and the useful arts" (Art. I, Sec. 8, Clause 8), and since petitioner has been deprived of his patent rights secured by an act of Congress by the deliberate act of respondent, it is certainly a matter of public interest whether the constitutional purpose shall be frustrated by said deliberate act with the approval of two national courts by the application of *unauthorized rules of construction* to a patent and by a denial of a review by this court. In any event, respondent has overlooked the consideration that ours is a "Government by lawsuit" (see "The Struggle for Judicial Supremacy," Jackson 286, 310) and that whenever the government functions, the public is interested.

What follows demonstrates that the rule applied by the circuit court of appeals in its "narrow" or "strict" construction (or shall we say rewriting) of the patent unsettles the *liberal* rule heretofore observed, so that there is a question "of public interest" and an "unsettled question of law involved" herein.

The patent (Tr. p. 293) recites:

> "It is manifest that with a car '*constructed*' in this manner, the chassis will be brought closer to the ground similar to the well-known underslung arrangement, and when applied on Ford cars will have a tendency to hold the car to the ground when traveling at high speed."

That language contemplates *original construction* embodying the patent, at least in the part before the comma. It would seem to authorize its use also on already constructed cars in the language after the comma.

The rule of construction adopted by the court of appeals was one by which it excluded the word "constructed" from the patent and interpolated the word "reconstructed" therein. Only thus could it arrive at the conclusion that the accused structure did not infringe. But this court

has pointed out that (*Rubber Co.* v. *Goodyear*, 9 Wall. 788):

> "A patent should be construed in a *liberal spirit* to sustain the just claim of the inventor. This principle is not to be carried so far as to *exclude what is in it* or to *interpolate anything* which it does not contain. But *liberality*, rather than strictness, should prevail where the fate of the patent is involved, and the question to be decided is whether the inventor shall hold the fruits of his genius, and his labors."

The rule applied by the court of appeals was diametrically contrary to the above and to that observed by other circuits (*Jabers Manville Co.* v. *National Tank Seat Co.*, 49 F. 2d 142; *Sun Ray Gas Corp.* v. *Bellows-Claude Neon Co.*, 49 F. 2d 886) and to other decisions of this court (*Turrill* v. *Ry.*, 1 Wall. 491; *Smith* v. *Snow*, 294 U. S. 1).

II.

This patent in suit expired on October 18th, 1938. Respondent is the only infringer. Its infringement was between 1932 and 1938. There never can be further litigation in another circuit involving this patent. Therefore, the rule in *Keller* v. *Adams et al.*, 264 U. S. 314, invoked by respondent does not apply.

The true rule in this sort of case has been well stated by the present chief justice in *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 83 L. Ed. 34, thus:

> "Petition for certiorari raising the question, among others, whether the court of appeals had erred in holding patentable a combination including one element not described in the original application for the Gulick patent and later added to it by amendment, and not described at all in the Mayard patent, *was at first denied, there being no conflict of decision.* 303 U. S. 639. We later granted certiorari in 304 U. S. 587, on a petition for rehearing, showing that notwithstanding the doubtful validity of the patent *litigation elsewhere with a resulting conflict of decision was*

improbable because of the concentration of the automobile industry in the sixth circuit."

The rule of the *Keller Case, supra,* invoked by respondent discriminates against inventors by closing the doors of this court to such persons. For a rule requiring persons of that humble class to litigate a controversy to final decision in one circuit in one way and to litigate over the same patent and to persuade a court of appeals of another circuit to render a conflicting decision concerning that same patent as a condition precedent to a remedy by certiorari in this court which condition is not imposed on other litigants is to discriminate against him and to deprive him of that equal protection which all others enjoy—contrary to the fundamental rule on that question well stated by Chief Justice Rugg in *Bogni* v. *Perrotti,* 224 Mass. 152, and by this court in *Green* v. *Biddle,* 8 Wheat. 75, and *Bronson* v. *Kenzie,* 1 How. 317. Indeed that rule if applied would render Section 347, Title 28, United States Code, void as a law authorizing the national courts to deprive an inventor of his property without due process because of the discrimination. Such a result would deprive this court of jurisdiction to grant a writ of certiorari in any case save those governed by Section 377, Title 28, United States Code Annotated.

III.

Respondent's suggestions that the proceedings in the Patent Office limited the claims is merely unfounded assertion which does not answer Reason XI, page 19 of the petition for certiorari, nor is it a justification of the act of the court of appeals in reading the introductory phrases of the claims into same as a limitation of the claims of the patent.

The introductory phrase in each claim, to-wit:

"An underslung attachment for motor vehicles"

was merely the title of the patent and no part of the combination described in each claim. No significance should have been given to the word "attachment." The word "device" or "contrivance" or some other such word would have been just as good. To read the title or introductory phrase into the claims was to render a decision in conflict with the decisions of other circuits (*Sly* v. *Russell & Co.*, 292 Fed. 851 (C. C. A. 6); *Nye Tool and Machine Works* v. *Crown Die and Tool Co.*, 292 Fed. 851 (C. C. A. 7)).

It was also in conflict with the statement of this court in *U. S.* v. *Société Anonyme et al.*, 224 U. S. l. c. 328, as follows:

> "It would indeed be arbitrary, as said by claimant, to read into the claim the specific metal of which these shells are composed, for no other purpose than to render it (the claims) worthless."

It was also in conflict with the rule of the Patent Office and the Court of Customs and Patent Appeals (see *In re Janell*, 120 F. 2d 1012, Syl. 1).

> "The preamble or introductory phrase of a patent claim may not be taken as a part of the subject matter of the claim."

The opinion says (l. c. 1014):

> "The solicitor for the Patent Office in this court cites a number of cases of this court to the effect that the preamble or introductory phrase of a claim may not be taken as a part of the subject matter of the claim. * * * The solicitor further argues that since the preamble may not be considered part of a claim, the limitation expressed in the preamble need not be considered, even though the application disclosure would support a patentable claim if it had been made and cites a number of cases including the famous 'wax nose' case—*White* v. *Dunbar*, 119 U. S. 47."

The reading of the preamble or introductory phrase into the claims by the court of appeals thus unsettled

another question of law which had been settled to the contrary by this court, by the other courts of appeal, by the Court of Customs and Patent Appeals and by the great executive or administrative agency charged with administering the patent laws of the country in the United States Patent Office itself.

Does it not necessarily follow that no more important questions of conflict in any patent case have ever been presented to this Honorable Court and hence that the writ should issue?

IV.

The claim that the prior art invalidated the patent is without merit for two reasons.

(1) The trial court refused respondent's suggested Findings of Fact 8, 9, and 11 (Tr. 14-15) and also Conclusions of Law 4, 5, and 6, thus deciding the issue as to "prior art of record" against respondent. Again Conclusion of Law 1 (Tr. 15) and Finding of Fact 10 to the effect that the claims of the patent in suit "alone survived" was a finding of validity (Tr. 15). These were issues tendered by respondent's pleading. The trial court decided those issues against respondent. Respondent did not appeal and cannot now be heard to question decisions from which it did not appeal (*Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U. S. 185.

Respondent's expert Brush testified that his experience began "in connection with the manufacture of the first car that was produced in this country in quantities." That he was chief engineer for the Cadillac Company and was associated with many automobile companies; was consulting engineer for all the divisions of the General Motors Company until 1913, acted as consultant in engineering matters and for fifteen years gave expert testimony in patent litigation, having taken out about 100 patents in his own name (Tr. 227-228).

While Mr. Brush was on the witness stand respondent offered "copies of the prior art references which were set up in the answer" (Tr. 228) (Tr. 67).

He then testified:

"Q. Mr. Brush, have you examined the prior art patents and publications just introduced and offered in evidence?
A. Yes.
Q. And do you understand the contents of them?
A. Yes.
Q. And have you examined the accused's structure, the defendant's?
A. Yes.
Q. Now, will you please discuss the disclosure of the Wheat patent so far as it has any application to the defendant's construction, *making such reference to the prior art patents and publications as may be pertinent*" (Tr. 232).

On cross examination he testified as follows:

"A. * * * Now, if you mean what I mean by combination, that is to say the specific construction illustrated and defined in the claim, no, I never saw precisely that construction.
Q. Yes; you never did see anything of that kind, either in the old days or in the new, isn't that right?
A. That is right * * *.
Q. That is to say, you never did see in any publication, or in all of your experience, a construction of the kind that Mr. Wheat patented?
A. Well, that again—now pardon me, Your Honor, I am not attempting to interpret the claim—
Q. (interrupting) I mean by that the combination described in the patent.
The Court: It is a simple question. Did you ever see it in a publication? That is your question?
Mr. O'Donnell: That is right.
A. The specific combination, the specific construction, no. Structures that accomplish the same result, yes" (Tr. 251).

* * * * * * *

"Q. What are the advantages of the V-8 Ford over the Model T, if any?

A. Greater passenger comfort, higher speed, greater safety at speed, better appearance, greater durability, in general a more desirable car" (Tr. 252).

The above testimony and the last answer demonstrate that the incorporation of the patent in the V-8 Ford and Model T Ford had the same result.

The result of such incorporation is thus established by petitioner's uncontradicted testimony.

"Q. Now, after you had perfected your structure did you have your car at any race track?

A. I did.

Q. Where?

A. Independence, Missouri.

Q. And did you test it?

A. I did.

Q. And you may state whether or not your test showed any improvement over the car or cars.

A. There was a very peculiar situation arose when that car was driven. It was found in time to remove in competition two cars, of similar Fords, similar structure, that the motor and axle structure, that is the structure utilizing that principle shown by the exhibits there, was from three to five seconds faster.

Q. Your structure?

A. Yes, my structure was from three to five seconds faster on the half-mile loop.

Q. What else, what other features did it have?

A. Well, it had a tendency to cling to the turns much better than the other structures" (Tr. 102).

Mr. Brush's evidence demonstrated that there was no "prior art of record" to limit the scope of what Mr. Brush's evidence demonstrated was a pioneer patent.

For—

"The state of a particular art, at the time of a particular invention, includes whatever *inventions,*

belonging to that art, had already been *invented* and *used* in the United States, or described in any printed *publication* in any country" (Section 230, Walker on Patents, Sixth Edition, page 316).

The fact that defendant's learned expert never in all his experience had seen a structure, patent, or publication such as that covered by petitioner's patent established lack of anticipation and lack of prior art. He further stated that he saw "structures and accomplished the same result" (Tr. 251) and then testified to facts establishing that the V-8 Ford cars were structures which had the advantages of "higher speed" and "greater safety at speed" than the old Model T Ford. When the patent was embodied in the old Model T Ford cars it was discovered that those cars attained "higher speed" and "greater safety at speed" than before (Tr. 102).

Mr. Brush's evidence, therefore, as a matter of law destroyed the claims of anticipation, limitation of claims by prior art and conclusively established respondent's infringement of petitioner's patent. For that evidence corroborated that of petitioner and established that the embodiment of the patent in the Model T and V-8 Ford automobiles caused each to achieve the same results, perform the same functions, by the same means or mode of operation.

So that the rule well stated by Walker on Patents, Sixth Edition, Section 238, applies to respondent's evidence and requires the application of the rule stated by him after analyzing four leading cases: Thus

> "The meaning of these four cases seems to be that every inventor is entitled to claim whatever he was the first to invent. If A. B. (Wheat) is the first to invent mechanism to perform a particular work, and if his invention is substantially incorporated into subsequent machines which do that work, then A. B. (Wheat) is entitled to such a construction of his patent as will be infringed by those later machines."

Why does not that rule apply here?

> "The mere fact that the various elements of a combination are old will not anticipate a claim to the combination."
>
> *Diamond Rubber Co.* v. *Consolidated Rubber Tire Co.*, 220 U. S. 428.
>
> 48 C. J. 31.

> "To find in the prior art each element in isolation is not to anticipate the work of an inventor who evolves a new combination of those elements which by their conjoined function produce a new result."
>
> 48 C. J. 31, citing *Parks* v. *Booth*, 102 U. S. 96; *Imahaeuser* v. *Burk*, 101 U. S. 607.

> "A combination is a union of elements, which may be partly old and partly new, or wholly old or wholly new. But whether new or old, the combination is a means—an invention—*distinct from them.*"
>
> *Leeds & Coblin Co.* v. *Victor Talking Machine Co.*, 213 U. S. 301.

V.

The Z-shaped bracket embodied in the accused structure by the equivalent thereof includes all of its parts so that no specified element of the patent is absent from the accused construction.

Respondent's brief says:

> "* * * the total absence from the accused construction of certain specified elements necessarily excludes that construction from the scope of the claims" (Resp. Br. p. 2).

The above is a mere assumption of absence "from the accused construction of certain specified elements." The claims in describing the "Z-shaped bracket" also mention its parts. Thus:

Claim 1—"The body portion of the bracket having an opening beneath the spring for the purpose specified."

Claim 2—"* * * an arm depending from the forward end of the bracket in parallelism with the body thereof, and a brace rod connecting the said arm and body and arranged transversely of the spring."

Claim 3—"* * * an arm depending from the forward end of the bracket and said arm and body portion of the bracket having a line crank receiving openings."

The court of appeals in describing the means specified in the patent claims referred to the bracket and its parts thus:

> "* * * to drop and fasten the front end of the frame upon a rearwardly extending arm of a substantially Z-shaped bracket, the upper or forwardly extending arm of which was mounted upon the front spring."

That is to say the finding as to the bracket included the above parts in it as a single element of the combination in accordance with the rule outlined in *Reed* v. *Edwards*, 101 F. 2d 550, that:

> "For patent purposes a given structure may in one sense be considered a single element and in another sense it may be so formed as to consist of several elements depending on the function to be performed by such elements."

Indeed the "depending arm" operated to make the "Z-shaped bracket" of the patent almost an exact duplicate of the sectional view of the Z-formed front cross member illustrated by the top or right photo thereof in Respondent's Exhibit 1 (Tr. 313) as admitted by respondent's counsel (Tr. 64).

Hence, the statement in the concluding paragraph of the opinion that

> "since the accused device * * * did not include elements essential to plaintiff's patented combination"

is not based on the record but on the gratuitous statement in respondent's briefs such as we find in its brief here. Respondent's evidence (Tr. 180-242) corroborated that of petitioner (Tr. 122-124) to the effect that the raised frame ends and Z-formed cross member was the equivalent of the Z-shaped bracket—that is the equivalent of the whole bracket, including its parts—and so since the whole element is equivalent to the accused element no element is absent.

VI.

The claim that petitioner has shifted the ground of his infringement contention is without foundation in the record and merely demonstrates how the lower courts were misled.

Respondent, on page 3 of its brief, says:

> "A further example of petitioner's misdirected effort is to be found in a shifting of ground for his infringement contention. At trial he went upon the proposition that an equivalent of his Z-shaped bracket was to be found in the upturned front end portions of the *side rails* or *sills* of respondent's chassis. Now he shifts from that position to an attempt at finding an equivalent in the *front cross member* of respondent's chassis.
>
> Thus petitioner would have this court issue a writ of certiorari for review on a different theory of infringement from that which will be found upon the record to have been advanced below—a singularity in conception of Supreme Court practice in patent jurisprudence, to say the least. 'He is not permitted thus to mend his hold' " (*Railway Co.* v. *McCarthy*, 96 U. S. 258, 267) (a personal injury case).

The record shows that the above statement has *no support in the record.* It is *directly contradicted by the record.* See petitioner's suggested Finding of Fact 3 (Tr. 11, 12). See also (Tr. 20, 122, 124, 94, 95) for petitioner's testimony.

"The spring is secured to the *front cross member*, which is the *same mechanical equivalent as the bracket* mentioned in the frame (Tr. 124).

The *cross member* acts in the same mechanical relation as the bracket" (Tr. 124).

On cross examination of petitioner by respondent's counsel, he was asked:

"Q. Now you are including as the Z-shaped bracket in this Ford V-8 construction then its *two side frame members* extending back about five feet and toward the center of the car, and also the cross main members, is that correct, *the front cross main member.*

A. Yes" (Tr. 122).

Respondent's only witnesses as to this point agree with petitioner (Tr. 180, 242). Hunt (Tr. 179-180) on testifying to anticipatory use of the patent bracket element on a race track in 1914 (Tr. 193), nine years before he built it in 1923 (Tr. 188), testified—

"We afterwards found it was much simpler merely to take out the *front* cross member in the Ford frame which extended downward *and raise the frame* and put in a *straight cross member* and get the *same distance lowering* as this with much less trouble" (Tr. 180).

Brush attributed the lowering in front, amongst other things, to a

"somewhat less deeply arched *cross* member" (Tr. 242).

so that not only did petitioner at the trial *testify* that the "turned-up front end portions of the *side rails or sills*" and "the *front cross member*" riveted thereto in the accused structure duplicated the Z-bracket but respondent's only witnesses on the question agreed with and corroborated petitioner on the point. This is further illustrated by cross examination of plaintiff by the same counsel who made the quoted statement. Thus:

> "Q. I would like to ask you whether or not it is your opinion that the *side frame members* of the Ford V-8 are the same thing as your Z-bracket?
>
> A. The *forward portion of the side frame member with its cross member* performs the same function" (Tr. 120).

Petitioner's petition herein expressly says (page 9):

> "* * * it was conclusively established by respondent's witness Hunt (Tr. 180) with the concurrence of petitioner (Tr. 82) that the *said raised frame and cross member* together accomplished the same distance lowering as the Z-bracket of the patent and constituted an equivalent thereof."

The above-quoted statement in respondent's brief directly contradicted as it is by the record furnishes *the only reason or excuse* for the *obiter* contradictory findings of the two lower courts. The decisions below were caused by acceptance of the "self-serving professions of those on trial," through their counsel and warrants the incredible implication that counsel for respondent knew whereof he spoke when he used the language quoted in *Parker Rust Co.* v. *Ford Motor Co.*, 23 F. 2d l. c. 506, that—

> "There is no power on earth, this side of the Supreme Court of the United States, which would make Henry Ford sign a license agreement or pay a royalty."

It is again respectfully urged that the writ prayed for issue.

Respectfully submitted,

EVERETT MEYERS,
WHITSON ROGERS,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.

FILED
NOV 14 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 237.

WILLIAM G. WHEAT, PETITIONER,

VS.

FORD MOTOR COMPANY, A CORPORATION,
RESPONDENT.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME.

EVERETT MEYER,
WHITSON ROGERS,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.

Supreme Court of the United States

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FORD MOTOR COMPANY, A CORPORATION, RESPONDENT.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME.

To the Honorable Supreme Court of the United States:

Petitioner states that the manuscript of the petition for rehearing herein was delivered to Mr. Kenneth Mendenhall, a law brief printer, at nine a. m. on November 6, 1941, with instructions by petitioner's counsel to Mr. Mendenhall to print said petition for rehearing and forward forty copies thereof to the clerk of the Supreme Court of the United States by air mail after service on the opposing counsel. That Mr. Mendenhall complied with said instructions and that forty printed copies of the said motion for rehearing were deposited in the United States mail during the afternoon of November 6 in accordance with the instructions of petitioner's counsel. That heretofore when briefs were so deposited in the United States mail they have been delivered to the clerk of the Supreme Court of the United States on the

following day by the postal authorities and that petitioner and his counsel believed that said petition for rehearing would be timely delivered by the postal authorities to the clerk of this court. That petitioner does not know why said forty copies were not delivered to the clerk of this court before November 8 as stated in the letter of said clerk to petitioner's counsel, and petitioner suggests that perhaps that the failure to deliver to the clerk on November 7 was due to weather conditions. Petitioner has been advised that sometimes the weather condition has prevented airplanes from going directly to Washington from Kansas City and compels the change of passengers and mail to steam trains at Cleveland, Ohio.

Wherefore petitioner respectfully prays that his petition for rehearing be now filed.

EVERETT MEYER,
WHITSON ROGERS,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.

State of Missouri, County of Jackson, ss.

Kenneth Mendenhall of lawful age, being duly sworn upon his oath, states that the facts, matters and things set forth in the above and foregoing motion stated with reference to the acts of said Kenneth Mendenhall in printing and mailing the petition for rehearing therein mentioned are true to the best of my knowledge.

Kenneth Mendenhall.

Subscribed and sworn before me this 12th day of November, 1941.

My commission expires January 16th, 1945.

Dorothy I. Remley,
Notary Public.

Supreme Court of the United States

OCTOBER TERM, 1941.

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FORD MOTOR COMPANY, A CORPORATION, RESPONDENT.

PETITION FOR REHEARING.

To the Honorable Supreme Court of the United States:

Petitioner respectfully prays a rehearing on the following grounds:

I.

The opinion of this court in *Schriber-Schroth Company* v. *Cleveland Trust Company*, 311 U. S. 211, 217-218, did not as applied to record in this case justify the ruling of the circuit court of appeals to the effect that each claim of the patent:

> "* * * is for a combination of elements arranged in a specific way, for the purpose of lowering the body of an *already constructed* automobile" (Tr. 488).

Said statement in the opinion of the court of appeals is followed by the statement (Tr. 488) that

> "It is apparent that, in view of the file wrapper history of this patent, its specifications, and the state of the prior art, only a narrow scope should be given to the claims of the patent, *Schriber-Schroth Company* v. *Cleveland Trust Company et al.*, 311 U. S. 211, 217-218, and that the patent could be accorded only a narrow range of equivalents" (Tr. 488).

The finding that the patent was for use only in "an already constructed automobile" operated to render the discussion in the opinion of the court of appeals from pages 488 to 490 of the transcript entirely *obiter*. The one question decided by the court of appeals and by the trial court (Tr. 456) which rendered discussion of any other question superfluous was the ruling that the patent as a matter of law and as a matter of construction applied only to *already constructed automobiles* and that it could not be infringed by embodiment in automobiles either before or *while being constructed originally*.

The fact that the opinion applied the "file wrapper history" rule, the "state of the prior art" rule and the "narrow range of equivalents" rule to the patent after finding that its use in a new automobile could not infringe discloses that the court of appeals was construing the patent by something external thereto and outside its language. That is to say the court of appeals resorted to "the patent office history" the "state of the prior art" and "the narrow range of equivalents" theories to enable said court to restrict the language of the patent and to limit the use of the patent to old cars and to authorize the embodiment of the patent in new cars without infringement rather than finding a basis for such ruling in the *language of the patent itself*. To restrict the written

instrument thus is to *construe* it—and to construe it *narrowly* in violation of the rule that patents are to be *liberally* construed so as to secure to the inventor the real invention which he intends to secure by his patent and in violation of the rule that technicalities or inaccuracies will not be permitted to prevent this result. That time-honored rule (*Henry* v. *Dick Brewing Co.*, 224 U. S. 1; *Winans* v. *Densmead*, 15 How. 330) the court of appeals ignored.

The court of appeals overlooked the consideration that patentees are a meritorious class and that all the aid and protection which the law allows the court will cheerfully give them (*Holloway* v. *Whiteley*, 4 Wall. 522). The opinion therefore changes the law. The acts of Congress providing for the right of a patentee to exclude others from using his patent has thus been ignored and the intentional appropriation of petitioner's property by respondent in its new automobiles or accused structures approved.

We most respectfully submit that the decisions of both lower courts holding that a patentee's patent may be appropriated bodily and entirely if only it be used in *new structures* instead of in *old* where the language of the patent does *not expressly* limit it to old structures are without support in the decisions of this and every other court and are directly in conflict with all of the decisions applying the *liberal* rule of construction (see Walker on Patents, Deller's Ed., Sec. 241).

The opinion of the trial court recites:

> "* * * the plaintiff, therefore, obtained a patent for means or devices which became efficient in *lowering the bodies* of automobiles *already constructed*" (italics by trial court, Tr. 456).

The patent (Tr. 287-295) contains neither express nor implied limitation to "already constructed" automobiles. If anything, the patent expressly contemplates embodi-

ment in an "originally constructed" automobile. In the specification is the recital:

"It is *manifest* that with a car *constructed* in this manner, etc." (Tr. 293). Thus it appears that the specification did not use the word "reconstructed." That word was in effect interpolated by the court of appeals into the patent in lieu of the word "constructed." The latter word was read out of the patent.

Of course the drawings (always distorted for purposes of clarity and hence sometimes positively misleading when compared with the photograph of an accused structure) having to do with devices or contrivances conveniently referred to as "attachments" to be embodied in an automobile and this circumstance may have misled the court of appeals and the trial court. But such circumstance could apply to every invention having to do with any machine and if applicable here would authorize every manufacturer of a *new* structure to appropriate any patent, without being guilty of infringement, which could be embodied in an *old* or *already constructed* machine.

The recognition of such principle (so formulated by the lower courts) by this court would revolutionize the law applicable to patents. The *narrow* rule of construction applied by the courts below is therefore in direct conflict with the *liberal* rule as to patents which has heretofore obtained in this court and every circuit court of appeals including that for the eighth circuit. And since the patent has expired there can be no conflict between the decision of another circuit court of appeals and that of the court below with reference to this patent. Thence the conflict above outlined is sufficient under *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, to justify the issuance of the writ.

II.

There is no conflict between the parties as to the facts in this record. Respondent's witnesses establish the

fact that the front cross member (Tr. 180) or "less deeper arched cross member" (Tr. 271) of the accused structure (Tr. 271) lowers the automobile by the same means in the same way and performs the same function as the front bracket of the patent illustrated by the exhibits shown at transcript 269. The physical facts and copyrighted advertising of respondent (Tr.) establish that the other elements of the patented combination are integrally duplicated in the accused structure. Again respondent's chief expert established that the patented combination "precisely that construction"—"the specific combination, the specific construction" never existed until petitioner created it (Tr. 251). Said expert also testified that he had seen "structures that accomplish the same result." The only structure described by him which accomplished the same result is the accused structure (Tr. 252).

III.

The principle of the decision of the circuit court of appeals relieving an infringer of the consequences of his infringement by enabling him to use the mental concept which constitutes the subject matter of every patent (*U. S.* v. *Dubilier Condenser Corp.*, 289 U. S. 178-224, l. c. 188) if only he has sense enough to use it in *new* or *original construction* frustrates the purpose of the Constitution empowering Congress to promote the progress of science and the useful arts by legislation, the purpose of the acts of Congress enacted in the exercise of said constitutional authority and the efforts of that branch of the governmental executive department known as the "Patent Office" to secure for the time limited by the acts of Congress the exclusive right to make and use any invention covered by a patent to the patentee thereof. These considerations in and of themselves demonstrate that this is a case necessitating the exercise by this Honorable Court of the discretion vested in it by the statute authorizing it to issue writs of certiorari to circuit courts of appeal.

The question as to whether or not a patent applies to an *old structure only* and therefore cannot be infringed by embodiment *in a new structure* must henceforth (if the opinion of the court of appeals be permitted to stand) depend not on the language of patent but on the discretion of the judge construing it. Hence, the decision below destroys the property element in patents which was heretofore supposed to be an integral part of same (Walker on Patents, Deller's Ed., Sec. 234, p. 1188). The decision of the court of appeals is itself the law rather than the statutes but a court cannot thus destroy property.

The power of a court to make law and to manufacture justice of a brand to suit its ideas would not be above the just claim of a final judicature if it were not a condition precedent to the exercise of such power and the rendition of such justice that the leading principle on which it must be based would be its own discretion. We respectfully call attention to the history of the world and to the lessons which, in this respect, must be deduced therefrom to the effect that whenever the life, liberty or property of any human being was made dependent for its preservation on the discretion of any man or tribunal the direct consequence was that the first franchise and first right of that human being and, incidentally, all those which thereon vitally depend, is to be vitiated for some cause of which no man knows and is to be proved by no known rule whatsoever of legal evidence. This is so anomalous, not alone to our whole Constitution, but to the civilization which has been evolved by the English-speaking race that we venture to say that the most trivial right which the citizen claims never was nor ever can be lawfully vitiated in such manner. That a court could properly decide by such rule could be supported only by the following method of reasoning: A court of last resort does not make laws. No, such power is not contended for; it only declares law and, as it is a tribunal both competent and supreme, what it declares to be law be-

comes law, though it was never law before. Then the circumstance that there is no appeal from its decision is made to imply that it is unnecessary to follow any rule or constitutional mandate in its exercise. The judgment does not derive its validity from conformity to the law, but preposterously the law is made to attend on the judgment, and the rule of the judgment is no other than the arbitrary and occasional will of the individual constituting the court. An arbitrary discretion leads, legality follows, which is just the very nature of a legislative and, hence, an arbitrary act.

The idea dominating the character of discretion herein referred to is that which in remote and barbarous ages resulted in the denial of human rights and the annihilation of human freedom. It is the species anathematized in the quaint and pointed phrase of Coke when he denounced the determination of legal questions by "the crooked cord of the discretion of the judges," rather than the "golden 'metawand' of the law." Such a discretion is well characterized by Camden in the court of common pleas in the trial of Hindson and Kersey when he said:

> "The discretion of a judge is the law of tyrants. It is always unknown. It is casual and depends upon constitution, temper and passion. In the best, it is oftentimes caprice. In the worse it is every vice, folly and passion to which human nature is liable."

IV.

It is, therefore, respectfully submitted that the conflict between the opinion of the court of appeals (Tr. 488) interpolating something into the patent that is not in it and reading that out of it which is in it and those of this court and the other circuit courts of appeal referred to in the petition for the writ and petitioner's reply brief from which it appears that the court of appeals ignored the time-honored liberal rule of construction theretofore followed by this court and all other federal courts in

construing patents (Walker on Patents, Deller's Ed., Sec. 241) which construction is a question of pure law and not of fact (Walker on Patents, Deller's Ed., Sec. 245) necessitates the granting of a rehearing, the setting aside of the order denying the writ, and the granting of the writ of certiorari to the end that the application of the above time-honored rule of construction may continue to function and that the law itself may not be changed and that the law may determine the fate of petitioner's patent rather than the novel and unauthorized rule followed by the circuit court of appeals.

Respectfully submitted,

EVERETT MEYERS,
WHITSON ROGERS,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.

We hereby certify that the above Petition for Rehearing is filed in good faith and not for delay.

EVERETT MEYERS,
WHITSON ROGERS,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.

Dated at Kansas City this 4th day of November, 1941.